

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

H. LEIGHTON LASKEY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 06-018-JJF
)	
PFC. ROBERT C. LEGATES,)	
PFC. WHEATLEY and JOHN DOE,)	
Supervisor on duty at)	
Millsboro Police Department,)	
)	
Defendants.)	

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS OF DEFENDANTS PFC ROBERT C. LEGATES, PFC WHEATLEY AND
"JOHN DOE" SUPERVISOR ON DUTY AT MILLSBORO POLICE DEPARTMENT**

1. Plaintiff's Answer Memorandum asserts that "if a defendant in a misdemeanor DWI case chooses to invoke their statutory right to refusal the police cannot involuntarily take chemical test." Plaintiff cites 27 Del. C. § 2742. Section 2742 (a) provides that "if a person refuses to permit chemical testing, after being informed of the penalty of revocation for such refusal, the test shall not be given but the police officer shall report the refusal to the Department." (Emphasis added).

2. A person under arrest for suspicion for driving under the influence of alcohol has the right to refuse submission to a blood draw only if the officer informs the person of the penalty of revocation for the refusal. McCann v. State of Delaware, 588 A. 2d 1100, 1101 (Del. Supr. 1991). In the absence of such a statement by the officer, reasonable force may be used to take a blood sample from a suspected drunk driver. Id. at 1102.

3. Plaintiff's Complaint does not allege that he was informed of the penalty of revocation for refusal. Thus, officers had the right to use force. Plaintiff may not rely on the invocation of a right to refusal as the basis for his contention that defendants acted impermissibly by "forcibly taking evidence."

WHEREFORE, defendants request that plaintiff's Complaint be dismissed with prejudice.

AKIN & HERRON, P.A.

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